THE MYTH OF BANKING SECRECY BEFORE TAX AUTHORITIES: THE CASE OF BRAZIL

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SYNOPSIS

This paper shows how access to the banking data of taxpayers by the Brazilian tax authorities operates. It presents two programs of international automatic exchange of financial information, the FATCA, implemented by the United States, and the CRS, developed by the OECD, which demonstrate the importance of access to the banking information by the tax authorities without judicial authorization as a measure to fight against tax fraud, foreign exchange evasion and money laundering. In this new paradigm of taxation, the so-called Global Treasury, fiscal isolation of nations, entrenched in their unmatched sovereignties has come to an end; hence, there is talk of the myth of banking secrecy before the Treasury.

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Bank secrecy has always been a controversial subject, especially in relation to access by tax authorities to the financial operations of the taxpayer without the intervention of the judiciary. Recently, the issue has gained relevance again because of two programs that have impacted strongly the world scene: i) the Foreign Account Tax Compliance Act - FATCA (law of tax compliance of accounts overseas), program implemented by the US for the purpose of exchanging bank data between them United States and more than 110 countries around the world, and ii) the Common Reporting Standard - CRS (Common Standard of Reporting), a program similar to the FATCA, implemented by the Organization for Cooperation and Economic Development (OECD), with the support of the G-20, which allows the exchange of financial information between the signatories of the Multilateral Convention on Mutual Administrative Assistance Regarding Tax Information, a sort of Global FATCA.

In Brazil, the problem was finally decided by the Federal Supreme Court in February of 2016. To better understand the context in which the resolution initially took place, we make a historical review of bank secrecy in the Brazilian legal system. We then demonstrate how access by tax authorities to banking information of taxpayers in the form of systemic and basic access works; we list the relevant points of the FATCA and the CRS; then, we highlight the main foundations of the decisions of the Direct Unconstitutionality Motions Nº 2.390, 2.386 and 2.397 2.859 and Special Appeal Nº 60.1314 whichi, after 15 years, proclaimed under the influence of the international commitments undertaken by Brazil (FATCA and SRC), the legality of the Complementary Act 105/2001 and related decrees.

Finally, after some criticism, we pointed out that in the era of Global Treasury, new paradigm of taxation, fiscal transparency and the exchange of information, the measures to combat tax fraud, foreign exchange evasion and money laundering, take up increasingly more space. Indeed, upon the declaration of constitutional of access by the tax authorities to the bank data without reservation of jurisdiction, the Brazilian Constitutional Court allowed Brazil to stay aligned with the major jurisdictions of the world economy.

In this new scenario there is no room for the financial transactions of taxpayers to remain invisible to tax authorities, whether internally or externally, that is why we affirm that banking secrecy before.

1. HISTORY OF BANKING SECRECY

Since ancient time discretion and secrecy were part of banking activity, given the fact the intermediation of credit always required mutual trust between banker and customer. In this context, secrecy emerged in banking activity spontaneously, on the basis of the "need or condition for the regular exercise of the granting of credit"; but later it became a "true obligation for banks." (Covello, 2001, p.19).

Nelson Abrão, given the difficulty of historical research to recognize a specific date for the origin[1] of the concept points out that the "secret emerged in the early stages of banking activity, which, in its discretionary nature, cannot be separated from it, barring under exceptional circumstances laid down by law, when the aim is to protect public order and common good". Also according to the author, the backdrop of banking secrecy is its "mystical connotation", which marked the origin of banks, which were started "within the temples" due to "an activity emanating from the gods themselves, represented by its priests[2]." Banking activity[3] had such mystic nature in its origins that it should have "a sacred character", so much so that the expressions "sacred" and "secret" keep lexical similarity and ontology. (Abrão, 2014, p. 88-89).

Among the many theories[4] that try to explain the legal basis of bank secrecy are the theory of the Constitution or fundamental law that holds that banking secrecy has a legal basis on the fundamental right to inviolability, either to privacy or intimacy[5] (article 5, paragraph X of the Federal Constitution - CF/88)[6], or the confidentiality of the data (article 5, (paragraph XII, CF/88) (Carvalho, 2014, ps. 37-38). It maintains, moreover, that, although there is not an absolute right, banking secrecy, for not having a constitutional basis, may only be restricted by a judicial decision, i.e., tax authorities could only access bank information of the taxpayer following a judicial authorization.

1. *Nelson Abrao notes that the code of Hammurabi, King of Babylon, includes the more ancient reference to banking secrecy, which allowed the "bankers to unlock their files in case of conflict with the customer." Indeed, is it inferred, in contrast, that in different circumstances the bank was obliged to keep the secret. (Abrão, Nelson (2014). Banking law. (15. ed.). Sao Paulo: Saraiva. p.89).*
2. *Chinen also suggests that the origins of banking secrecy, "as well as its evolution, mix up with the banking institutions, dating back to the Mesopotamian civilizations" and one of their features was the religious aspect. (Chinen, Roberto Massao (2005). Banking secrecy and the treasury: freedom or equality. Curitiba: Juruá. 21).*
3. *According to Nelson Abrão, there is a "consensus that the banking activity, as a specialized profession, emerged in Greece. But, even so, not entirely disconnected from its threshold in the temples, its origin: those of Delphi [...]. Bankers, in addition to promoting safe protection of the values of their clients, drafted negotiable instruments and provided guidance to their business, thanks to the knowledge they possessed of legal texts ". (Abrão, Nelson (2014). Banking law. (15. ed.). Sao Paulo: Saraiva p. 89)..*
4. *For theories on the basis of banking secrecy check in: Covello, Sérgio Carlos. (2001). The banking secrecy: with special emphasis on civil protection. (2. ed.). Sao Paulo: University Bookstore of Law. p. 113-164; Roque, Maria José Oliveira Lima (2001). Banking secrecy & right to intimacy. Curitiba: Juruá. p. 87-95; Barbeitas, André Terrigno (2003). Banking secrecy and the need for weighting the interests. Sao Paulo: Malheiros. p. 16-18; Carvalho, Márcia Haydée Porto de (2014). Banking secrecy in Brazil – limitations, competence and conditions for its loss. (2. ed.). Curitiba: Juruá. p. 36-38; Chinen, Roberto Massao (2005). Banking secrecy and the treasury: freedom or equality. Curitiba: Juruá. p. 24-29; Quezado, Paulo & Lima, Rogério. (2002). Banking secret. São Paulo: Dialética. p. 22-30; Gomes, Noel. (2006). Banking secrecy and tax law. Coimbra: Almedina. p. 19-24; Hagström, Carlos Alberto (2009). Comments on the law of banking secrecy: Complementary law n° 105, of January 2001. Porto Alegre: Sérgio Antônio Fabris Editor. p. 49-70.*
5. *Criticisms of this theory are based on the fact that the rights of individuals are fully valid and cannot be waived and banking secrecy involves exceptions, in addition to the fact that the holder may renounce it. It is also alleged that secrecy in banking activity arose before the notion of personality. In the time of slavery, the slave, who was not considered a person, was guaranteed he right to secrecy regarding banking transactions; which proves that secrecy emerged in order to offer protection to banking activities and not to the person or intimacy. (Roque, Maria José Oliveira Lima (2001). Banking secrecy & privacy. Curitiba: Juruá. p. 94). Chinen also refers to the subject in the theory of the right to privacy. (Chinen, Roberto Massao (2005). Banking secrecy and the treasury: freedom or equality. Curitiba: Juruá. p. 29).*
6. *Constitution of the Federative Republic of Brazil (1988). Brasilia: Federal Senate.*

2. ACCESS TO BANKING INFORMATION BY BRAZILIAN TAX AUTHORITIES

In Brazil, Complementary Law N° 105 of January 10, 2001[7] defines banking secrecy as the duty of financial institutions to keep the confidentiality on their active and passive operations and services rendered; it lists the financial institutions subject to said obligations; and affirms, among other hypotheses, that it does not constitute a violation of secrecy:

i. the exchange of information between the financial institutions for registration purposes; (article 1, § 3º, I-. Information for private purposes);
ii. the disclosure of confidential information with the express consent of the interested parties; (art. 1, § 3º, V);
iii. that the Executive Branch controls the criteria according to which financial institutions must report to the Federal tax administration, financial transactions carried out by the users of its services (art. 1, §3 th, VI c/c Article 5 – information of interest to tax authorities);
iv. examination of the bank details of the fiscal agent of the tax administrations in the cases and conditions specified (art.1º, § 3, VI c/c Article 6 - information of interest to tax authorities)

The access of tax authorities to information on the financial transactions of taxpayers can occur in two ways:

i. systemic access - mode in which only the Secretariat of Federal Revenues may access, through the system, the monthly total amount managed by the taxpayer - not including the identification of the origin or the nature of the expenses - according to the information regularly provided by financial institutions; (art. 5);
ii. basic access - mode in which that the tax authority of the Federation, the States and municipalities, through certain requirements (established administrative process or ongoing tax procedure, obligation to examine the banking information, among others), request bank information - bank statements, for example-, directly from financial institutions; (art. 6).

2.1. Systemic access

Article 5 of the Complementary Law 105/2001 dealing with systemic access, authorizes the Executive Branch to regulate the criteria under which the financial information will be transmitted by financial institutions exclusively to the Secretariat of Federal Revenues; it establishes that such information is limited to identifying the holder of the operation and the global amount managed monthly, prohibiting the inclusion of any provisions that allow to identify the origin or nature of expenses made (art. 5º, § 2º). In case of detection of signs of failure, inaccuracies or omissions, or the commission of any tax irregularity, the Tax Administration is allowed to request the information and documents it may need, as well as to perform the audit in order to investigate the facts (art. 5, art. 5º, § 4º)[8]. Finally it establishes that the financial information

7. *Complementary law Nº 105 of January 10, 2001. It governs the secrecy of the operations of financial institutions and regulates other provisions. Consulted on Jan. 7, 2016, http://www.planalto.gov.br/ccivil_03/leis/LCP/Lcp105.htm*

8. *After detecting anomalies due to the crossing of other information contained in systems of the Brazilian Secretariat of Federal revenues, especially of revenues annually declared by individuals and legal entities, the competent administrative authority may initiate an investigation of selected taxpayers, and may request [...] the information and documents it may need, which gave support to these global amounts moved as well as perform inspection or audit for the correct determination of the facts. Saraiva Filho, Oswaldo Othon Bridges (2008). The banking secrecy and the tax administration (Complementary Law nº105/2001; INRFB Nº 802/2007). Tax Law Forum Magazine, 6(34), 1-65. P. 10.*
This involves the power and control of verification, since the tax authorities may request (demand, being authorized by law, the provision of a service or the delivery of a good addressing, under certain circumstances, the public interest) and not simply request (request, require any right claim in a trial;). Dias, Roberto Moreira. (2005). Burden of proof after the Complementary Law 105/2001 and bank deposits. Tax and Public Finance Magazine, 13(64), p. 22-29.p. 26.

transmitted to the tax administration of the Union will be kept under tax secrecy[9] (article 5, § 5º).

Complementary Law nº 105 of January 10, 2001.

> [...] Article 5º T**he Executive Branch shall regulate, even with respect to the frequency regarding the value limits, the criteria according to which financial institutions shall inform the tax administration of the Union, about financial transactions made by users of its services.** (Regulation)
>
> [...]
>
> § 2º information transferred under the heading of this article shall be limited to reports relating to **the identification of holders of transactions and monthly total amounts moved, prohibiting the inclusion of any element allowing to identify their origin or nature of the expenses they have incurred**.
>
> [...]
>
> § 4º After the reception of the information in this article, in case of signs of failure, inaccuracies or omissions, or the commission of tax irregularities, the competent authority may request the information and documents it may need, as well as perform an inspection or audit to properly investigate the facts.
>
> § 5º **The information mentioned in this article will be kept under tax secrecy provisions, in accordance with the existing legislation**. (boldface is ours)

Decree Nº. 4.489[10], of November 28, 2002, which regulates article 5 of the Complementary Law Nº 105/2001, provides: i) that the information relating to financial transactions must be provided continuously, in digital files, according to the specifications defined by the Secretariat of Federal Revenues (art. 2); ii) what is the total monthly amount moved in the operations specified (article 3); iii) minimum limit - R$ 5,000.00 (five thousand reais) for individuals and R$ 10.000,00 (ten thousand real) for corporations - in relation to the total monthly amount that shall be reported to the Secretariat of Federal Revenues (art. 4); iv) that the Secretariat of Federal Revenues may change the limits established in art. 4° (art. 5°).

Based on Decree nº 4.489/2002 the following statements were introduced: i) statement of operations with credit cards (Decred), whose presentation is mandatory for managers of credit cards (Ordinance SRF 341 of July 15, 2003); ii) Declaration of Information on Financial Transactions (Dimof), whose filing is mandatory for the banks of any kind, savings and loan associations, and for institutions that are authorized to perform operations on the currency market, (Ordinance RFB Nº 811, of January 28, 2008[11]); iii) e-financiera, statement covering the then existing information in the Dimof[12] and adds new data derived from international agreements signed by Brazil for the purpose of automatic exchange of financial information (Ordinance RFB 1.571, from July 2, 2015)[13].

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9. *National Tax Code: Article 198. Without prejudice to the criminal law, the disclosure by Public Finance authorities or its employees of any information obtained under their trade on the economic or financial situation of taxpayers or third parties and on the nature and the status of their business or activities is prohibited. (Writing offered by Complementary Llaw Nº. 104, 2001).*
10. *Decree N° 4.489 of November 28, 2002. It regulates article 5 of Complementary Law No. 105 of January 10, 2001, concerning the provision of information to the Secretariat of Federal Revenues under the Ministry of Finance, by financial institutions and similar entities, concerning financial transactions made by users of its services. Consulted on January 7, 2016, http://www.planalto.gov.br/ccivil_03/decreto/2002/d4489.htm. See Ordinance RFB 802, December 27, 2007. Available on the provision of information in accordance with article 5 of Complementary Law Nº. 105 of January 10, 2001. Consulted on January 7, 2016, at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado & idAto = 15755.*
11. *Ordinance RFB no 811, of January 28, 2008. Establishes the Statement of Information on Financial Transactions (Dimof) and other measures. Consulted on Jan 7. 2016, at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=15765&visao=anotado*
12. *With the establishment of e-financiera the filing of information appearing in the Dimof in relation to events from the January 1, 2016 is waived (art. 12, sole paragraph of the UN RFB 1571/2015).*
13. *Ordinance RFB no 1.571, of July 2, 2015. Available on the obligation to provide information on the financial transactions of interest to the Brazilian Secretariat of Federal Revenues (RFB). Consulted the Jan. 7, 2016, at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=65746&. Sobre la implementación de e-financiera verifique la información de la Secretaría de Ingresos Federales disponible en: https://www.youtube.com/watch?v=MbvidYLykwc>, accessed on 01.02.2016.*

2.2. Indispensable access

Article 6 of Complementary Law N° 105/2001, which centers on the indispensable access, provides that the tax authority of the Union, States, Federal District and Municipalities may only examine the bank information when there is an open administrative process or an ongoing fiscal procedure and provided that such evidence is considered necessary by the competent administrative authority[14]. It also establishes that the results of evidence and scanned documents will be under the protection of tax secrecy provisions.

Complementary Law Nº 105, of January 10, 2001

> [...]
> Article 6º The authorities and tax fiscal agents of the Union, States, Federal District and Municipalities can only examine documents, books and records of financial institutions, including those related to deposit and investment accounts, when there is an **open administrative process or an ongoing fiscal procedure and these audits are considered indispensable by the competent administrative authority**. (Regulation)
>
> Sole paragraph. **The result of the aduits, information and documents referred to in this article will remain secret, according to the tax legislation**. (boldface is ours).

At the federal level, the indispensable access provided for in article 6 of Complementary Law N° 105/2001 was regulated by Decree N°. 3724 of January 10, 2001, laying down a series of requirements to the review of the financial transactions of taxpayers.

To allow direct access to bank information, initially a verification procedure[15] should be opened for the taxpayer (as defined in article 7 and subsequent provisions of Decree nº 70.235[16], March 6, 1972) and the reason why the review of financial transactions is considered to be indispensable - either as a result of a difference determined by the comparison between the global amount handled by the taxpayer (systemic access) and the amount reported to the Secretariat of Federal Revenues (income statement), or for any other reason - must include the limited role of the necessary hypotheses provided for in article 3 of Decree Nº 3.724/2001. See:

14. *Only starting from the detection of probable evidence of tax irregularities arising from the [...] exchange of information, and in keeping with the criteria of tax relevance and interest, the Brazilian Secretariat of Federal Revenues sets a verification procedure of selected taxpayers, which enables the request and examination of documents, e.g. bank statements, which gave rise to the global amounts managed, provided that the provision in article 6 of Complementary Law No. 105 of 2001 is complied with. (Saraiva Filho, Oswaldo Othon de Pontes (2008). The banking secrecy and the Tax Administration (Complementary Law N° 105/2001;) IN-RFB No. 802/2007). Tax Law Forum Magazine, 6 (34), 1-65 p. (10).*
15. *RFB Ordinance No. 1.687, of September 17, 2014, establishes that the fiscal procedures will be established after their assignment through the specific administrative instrument called a Tax Procedure Assignment Term (TDPF). The assignment of the tax procedure will be preceded by the activity of selection and preparation of the tax action, which will be impersonal, objective and based on technical parameters defined by the Secretariat of Federal Revenues and executed by Tax Auditors of the Brazilian Secretariat of Federal Revenues. The TDPF is issued only in electronic format, and the taxpayer's acknowledgment will occur in the RFB online website, with the use of an access code set in the term that formalizes the start of the fiscal procedure, by which the taxpayer may certify the authenticity of the procedure.*
16. *Decree 70.235/72, approved by the CRFB/88 as ordinary law, governs the tax administrative process - PAF of assessment and requirement of tax credits of the Union and consultation on the implementation of the federal tax legislation. Art. 7 The tax procedure begins with: I - the first official act exercised, written, performed by a competent employee, informing the taxpayer of a tax liability or his/her proposal; II - the seizure of goods, documents or books; III - the beginning of customs clearance of imported goods.*
    § 1° The commencement of proceedings excludes the spontaneity of the taxpayer in relation to the preceding actions and regardless of notifying others involved in violations recorded.
    § 2 ° For the purposes of the provisions of §1°, the actions referred to in items I and II shall be valid for a period of sixty days, renewable successively for the same period, with any other written document indicating the continuation of work.

Decree Nº 3.724, of January 10, 2001

[...]

Article 2º The fiscal procedures related to taxes and contributions administered by the Brazilian Secretariat of Federal Revenues - RFB will be executed by those who hold the actual position of Tax Auditor of the Brazilian Secretariat of Federal Revenues and will begin through the prior issuance of the Fiscal Procedure Assignment Term - TDPF, in accordance with the procedure to be laid down in the Act of the Brazilian Secretariat of Federal Revenues. (Writing offered by the Decree N° 8.303, of 2014)

[...]

§ 2º The modality of fiscal procedure referred in the article 7° and subsequent provisions of Decree N° 70.235, of March 6, 1972 is defined as verification procedure. (Writing offered by the Decree N° 6.104, of 2007).

[...]

§ 5º The Brazilian Secretariat of Federal Revenues, through the employee holding the position of **Tax Aditor of the Brazilian Secretariat of Federal Revenues, may only examine information concerning third parties, contained in documents, books and records of financial institutions and other similar entities, including those relating to accounts, deposits and investments, when there is an ongoing verification procedure and such reviews are considered to be indispensable**. (Writing offered by the Decree N° 6.104, of 2007).

[...]

Article 3º **The reviews referred to in § 5º of article 2º are only considered to be necessary in the following cases:** (Writing offered by the Decree N° 6.104, of 2007). (boldface is ours).

I – underestimation of values of operation, including foreign trade, acquisition or sale of property or rights, based on the corresponding market values;

II – obtaining loans from non-financial corporations or individuals, when the taxpayer cannot corroborate the cash receipt

III – the practice of any operations with individuals or corporations residing or domiciled in a country with favored taxation system or beneficiaries of the tax regime referred to in articles 24 and article 24-A of Law No. 9.430, of December 27, 1996; (Writing offered by the Decree N°8.303, of 2014)

IV - omission of revenue or net income derived from investments in fixed or variable income;

V – incurring in expenses or investments higher than available income;

VI – remittances overseas, on any account, through non-resident account of securities incompatible with the availability of declared valuables;

VII – provided for in article 33 of Law N°. 9.430, of 1996;

VIII – corporation on the National Register of Corporations (CNPJ), under the following conditions of status:

(a) cancelled;

(b) inadequate, in those cases provided for in article 81 of the Law N°. 9.430, of 1996;

IX – Individuals without registration on the Register of Individuals (CPF) or with cancelled registration status;

X – refusal by the holder of the account of de facto ownership or liability for the financial transactions;

XI – presence of any indication that the de facto owner is indeed a third party; and (writing offered by the Decree N° 8.303, of 2014)

XII – exchange of information, on the basis of treaties, agreements or international agreements, for the purpose of collection and verification of taxes. (Including by Decree N° 8.303, of 2014)

§ 1º does not apply the provisions of subparagraphs I to VI, when the calculated differences do not exceed ten per cent of the market or declared values, as the case may be.

§ 2º is considered indicative of posing as someone else, for the purposes of subsection XI of this article, when:

> I - the information available, in relation to the taxpayer, points to financial transactions more than ten times the disposable declared income, in the absence of the Statement of Annual Adjustment of Income Tax, the annual transaction amount was higher than that established in subsection II of § 3º of article 42 of Law N°. 9.430, of 1996;
> II - the registration form of the taxpayer, in the financial institution, or similar entity, contains:
> (a) false information regarding the address, income or equity; or
> (b) an income lower than 10% of the annual amount of the transactions.

The hypothesis of indispensability is specific and "reveals aggressively evasive behavior," and also allow that "Brazil complies with international treaties for the exchange of information in order to combat evasion, corruption, money-laundering and the financing of terrorism":

> i) fraud in international trade; ii) simulation of loans to cover up resources of dubious origin, even derived from trafficking in drugs and arms; iii) transactions with tax havens or countries which do not allow access to information concerning the social composition, ownership of property or rights or economic transactions made; iv) omission of income derived from variable income, including operations outside of the stock exchange; v) engaging in expenses or investments for an amount exceeding disposable income; vi) remittances of amounts overseas on behalf of non-residents that are incompatible with the declared amounts earned; vii) taxpayers subject to the special regime of compliance of obligations, such as, for example, companies consisting of front people; viii) non-existent legal persons in fact; ix) people physical non-existent in fact; x) refusal by the holder of the ownership right over resources kept or handled to collaborate; and xi) presence of indication of existence of front person by the de facto holder of resources (facades or proxies), in this case, characterized, objectively, by financial transactions ten times higher than income available or declared or, even, if the registration form of the taxpayer at the financial institution contains false information. (Secretariat of Federal Revenues, 2016b, p. 4)

Among the subsections listed in art. 3º we want to highlight subsection XII that deals with the "Exchange of information, on the basis of treaties, agreements or international conventions, with purposes of collection and verification of taxes." In this case, although Brazil has no immediate interest on the collection and verification of taxes, according to the sole paragraph of article 199 of the national tax code[17], said interest stems from the Treaty signed by the signatory State. Therefore, the international agreement, by virtue of its nature and mutual obligations, mainly in relation to the secrecy of the information, justifies the administrative procedure, with the subsequent access to bank information of taxpayers. The "verification made in another State would be equivalent to the verification made in Brazil, with the ensuing need for continuity," through the issue of a Tax Procedure Assignment Term. (Godoy, 2009, p.17).

Next, after the verification procedure is open, the taxpayer must be aware that he/she is under the fiscal action and must be summoned to submit details pertaining to his/her financial transactions. If they refuse to provide this

17. *Art. 199. The Public Treasury of the Union and that of the States, the Federal District and the Municipalities will collaborate with one another for the verification of the respective taxes and exchange of information, in the manner established, generally or specifically, by law or agreement.*
Sole paragraph. The Public Treasury of the Union as set out in the treaties, agreements or conventions, may exchange information with foreign States in the interest of raising and overseeing taxes. (Included by Complementary Law Nº. 104, 2001).

information, it will be requested directly from financial institutions through the issuance of a request for information on financial transactions - RMF, which is subject to the following requirements: i) prior summons issued to the taxpayer to submit information on his/her financial transactions; ii) failure to submit or absence of express authorization for direct access to the information; iii) detailed report prepared by the Tax Auditor of the Secretariat of Federal Revenues responsible for the tax procedure or his immediate boss, which must include the origin of the proposal for issuance of the RMF showing, with precision and clarity, that this is a situation under the hypothesis of indispensability under article 3º of Decree Nº 3.724/2001. After these requirements are met, the RMF will be issued by a competent tax authority[18] other than that which drew up the report.

Decree 3.724, of January 10, 2001

[...]

Article 4º The competent authorities **may request the information referred to in § 5º of article 2° to issue the TDPF** (writing offered by the Decree N° 8.303, of 2014)

§ 1º The request referred to in this article shall be formalized by means of document called **Request for Information of Financial Transactions (RMF)** and shall be addressed, as appropriate, to the:

I - Chairman of the Central Bank of Brazil, or his representative;

II - Chairman of the Securities Commission, or his representative;

III - President of the financial institution, or similar entity, or his representative;

IV - Branch Manager.

§ **2º The RMF will be preceded of a summons of the taxpayer to present the information of financial transactions, necessary for the application of the procedure tax.** (Writing offered by the Decree N° 8.303, of 2014)

§ 3º The **taxpayer can answer the summons referred to in § 2º by means of:** (Writing offered by the Decree N° 8.303, of 2014)

I – **Express authorization of direct access to the information on the financial transactions from the tax authority;** or (included by the Decree N° 8.303, of 2014)

II - **Presentation of information on financial transactions, in which case he will be responsible for its accuracy and integrity, observing the applicable criminal law.** (Included by Decree N° 8.303, of 2014)

§ 4º The information provided by the taxpayer may be object of verification in the institutions mentioned in article 1˚, even through the Central Bank of Brazil or of the Securities Commission, as well as the comparison with other information available at the Secretariat of Federal Revenues.

§ 5º The **RMF will be issued on the basis of a detailed report prepared by the Tax Auditor of Brazilian Secretariat of Federal Revenues responsible for the application of the tax procedure or by the immediate supervisor**. (Writing offered by the Decree N° 8.303, of 2014)

§ 6º The report referred to in the above paragraph, must include the **grounds for the proposed issue of the RMF**, which shows, with precision and clarity, that this is a situation

18. *The competent authorities for issuing the TDPF and RMF under article 7 of the Ordinance RFB No. 1.687/2014 are: General Coordinator of Verification; General Coordinator of the Customs Administration; Superintendent of the Brazilian Secretariat of Federal Revenues; Delegate of Brazil's Federal Revenues; Chief Inspector of Brazil's Federal Revenues; Inspector General; General Coordinator of Audits and Investigations; General Coordinator of Programming and Studies; Special Coordinator for Refunds, Compensation and Restitution; and Special Coordinator of Large Taxpayers.*
"For added security, the Brazilian Secretariat of Federal Revenues established that the issuer of the order [TDPF] should hold a management position." The Fiscal Auditor is responsible for the TDPF. He will only decide based on the request for information on financial transactions if pursues one of the management duties. "Such limitations of formal order, together with the description of the material conditions that justify an opening in bank secrecy, come together to give credibility and reliability to the system." (Gramstrup, Erik Frederico (2014). Tax and banking secrecy: normative and principled fundamentals of opening secrecy. Brazilian Magazine for Constitutional Studies, 8 (28), 95-117 p. 107.

> under the **hypothesis of indispensability** laid down in the above article, subject to the principle of the reasonableness. (boldface is ours).

By having the financial transactions submitted by the taxpayer or the financial institution, upon analyzing the valuables credited to a deposit or investment account, tax authorities should ignore the amounts derived from transfers to another account of the same individual, if it were the case. Subsequently, the taxpayer must be again summoned to corroborate the origin of the other valuables accredited in his(her) account(s). If unable to corroborate the origin of resources, through valid and appropriate documentation, the valuables presented must be officially submitted, claiming presumption omission of declared income, under the terms of article 42 of law N° 9.430[19], of December 27, 1996.

> **Law N° 9. 430, of December 27, 1996**
> Article 42. Also defined as **omission of income or revenues** are amounts credited to a deposit or investment account in a financial institution, in relation to any holder, individual or corporation, regularly summoned, **who fails to corroborate, through valid and appropriate documentation, the origin of the resources used in these transactions**.
> [...]
> § 2º The valuables whose origin have been corroborated, which had not been accounted for on the basis of the calculation of taxes and contributions they were subjected to, will undergo specific tax provisions, outlined in the existing legislation at the time they were earned or received.
> § 3º For the purpose of determining the undeclared income, credits will be analyzed on an individual basis, noting that the following **will not be considered**:
> I - **income derived from transfers from other accounts of the same individual or corporation;**
> II - in the case of **individuals**, without prejudice to the provisions of the preceding paragraph, those **amounting** equal to or less than **[R$ 12,000.00 (twelve thousand reais**)], provided that their sum, within the calendar year, does not exceed the amount of **[R$ 80.000,00 (eighty thousand reais)**]. (Adjusted values, in accordance with the Law N°. 9.481 of August 13, 1997)

In terms of the amounts whose origin was corroborated, but which were not declared on the basis of the calculation of taxes and contributions they were subjected to, in checking their condition as subject to the payment of tax, we are facing an omission of income itself and not a presumptive omission; in fact, payment of taxes shall occur in accordance with the specific rules laid down in the current tax law.

Complementary Law N° 105/2001 also establishes that banking secrecy must be observed for both systemic and indispensable access, i.e. banking data after being transferred to the Treasury are under the protection of tax secrecy provisions, without prejudice to the former. In this regard, the majority position of the Supreme Court of Justice[20] in judging Direct Unconstitutionality Motions N° 2.390, 2.386, 2.397 and 2.859 - which declared the constitutionality of Complementary Law N° 105/2001 - and part of the doctrine

19. *The legality of Article 42 of the Law no 9.430/96 was questioned in the Special Appeals Motion 855.649, whose overall impact was recognized on 22.09.2015.*
20. *The position of the STF will be addressed below.*

understand that, under this condition, there is no breach[21]of secrecy provisions, but rather the transfer of secrecy[22] from the financial institution to the tax administration; however, the law does not make a distinction between transfer of secrecy provisions and breach of secrecy provisions[23].

The breach of secrecy occurs when the data - bank or tax data - are accessed by persons not authorized by law, judicial decision or without authorization from the taxpayer, i.e., when the data are breached. Note that in the aforementioned art. 1º, § 3º, VI, the law lists the cases that not constitute a breach of bank secrecy, including, the provisions of the article 5° and 6°. If in such cases there is no breach of secrecy provisions, it can, therefore, be inferred that there would be no violation of secrecy provisions, but rather a transfer.

It just so happens that part of the doctrine, on the other hand, understands that the term transfer of secrecy would be a “manifest sophism, because this transfer to Federal Revenues gives rise to the unlawful breach of secrecy provisions.” (Reale & Martins, 2005, p.13). This doctrinal trend asserts that the Treasury’s access to bank information of the taxpayer without prior judicial authorization is unconstitutional.

Below we will see two measures listed as real milestones in terms of banking secrecy before the State Treasury.

21. *According to De Placido, ‘breach,’ “in the fluent language, in application of the Law, is interpreted also as a breach or failure to comply with one’s assumed duty” and “secrecy” is the secret that must not be breached. Silva, de Placido and (2009). Reference. In: P. Silva. Legal Vocabulary. (28. ed. pp. 1135-1289). Rio de Janeiro: Forense.*
22. *In this same sense: Saraiva Filho, Oswaldo Pontes Othon. (2011). Banking and tax secrecy related to the tax administration and the attorney general’s office. In: O. O. P. Saraiva Filho & V. B. Guimarães, (Coord.). Banking and tax secrecy: homage to Legal Expert José Carlos Moreira Alves. (pp. 17-83). Belo Horizonte: Forum. p. 35; Santi, Eurico Marcos Diniz (2011). Secrecy and tax law: transparency, control of legality, right to the prove and the transfer of banking secrecy to the tax administration under the Constitution and the Complementary Law n. 105. In: O. O. P. Saraiva Filho & V. B. Guimarães, (Coord.). Banking and tax secrecy: homage to Legal Expert José Carlos Moreira Alves. (pp. 17-83). Belo Horizonte: Forum. p. 596-597; Justice Cármen Lúcia (Special Appeal no 389.808/PR, ruling 15/12/2010. Justice Rapporteur Marco Aurelio. Electronic Daily of Justice, May 9, 2011, p. 233); Justice Dias Toffoli (Special Appeal no 389.808/PR, p. 231); Justice Ellen Gracie (Injunction Nº 33/PR, ruling on 24.11.2010. Justice Rapporteur Marco Aurélio. Electronic Daily of Justice, February 9, 2011, p. 63).*
23. *An example in which the term ‘breach of secrecy’ was used correctly: Law 9.296, of July 24, 1996, Art. 10. It constitutes a crime make the wiretapping of telephone, computer or telematics communications, or to violate the secrecy of confidentiality in justice, without judicial authorization or for purposes unauthorized by law.*

3. THE FOREIGN ACCOUNT TAX COMPLIANCE ACT - FATCA (USA) PROGRAM

The Foreign Account Tax Compliance Act (foreign accounts tax compliance Act) is a system of declaration of information which aims to identify financial accounts of U.S. persons[24] (US accounts) maintained outside the United States by financial institutions around the world in order to increase transparency and avoid tax evasion in the United States[25].

In light of budgetary difficulties, tax evasion by US taxpayers[26] using goods and assets in foreign entities, but not declared to the US Treasury - UBS case[27] - and to enhance fiscal transparency, the US Congress on 18.03.2010 enacted the Employment Incentives Act (The Hire Incentives to Restore Employment Act, or Hire Act) which established a set of measures to encourage the creation of jobs in the U.S. The aforementioned law states that foreign financial institutions (Foreign Financial Institutions – FFI) from around the world must identify the accounts of US persons (individuals and corporations) – US accounts – and report them to the US Treasury (IRS - Internal Revenue Service), in an automatic fashion. The FFI's that fail to cooperate or that do not provide accurate information may be taxed at 30% on any payment of interest, dividends, rents, wages, salary, awards, annuities, compensation, remunerations, emoluments and other fixed income or variable or periodic annual income, earnings and revenues, if said payment came from sources within the United States.

The legislation was included in Chapter 4, sections 1471 to 1474, of the US Tax Code of 1986 (Internal Revenue Code), referred to as the Foreign Account Tax Compliance Act (foreign accounts tax compliance Act), better known as FATCA.

During the FATCA regulation the U.S., with the common goal of intensifying cooperation in the fight against international tax evasion, agreed to sign bilateral intergovernmental agreements (Intergovernmental Agreement - IGA) with France, the United Kingdom, Spain,

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24. *Citizen of the U.S. or person residing in the U.S., a corporation or company organized in the U.S. or based on U.S. laws or from a U.S. State, or a trust ("Trust") if (i) a U.S. Court of Justice had authority in the field of the legislation applicable for issuing orders or rulings on substantially all matters related with the administration of the trust ("Trust"); and (ii) one or more persons from the U.S. had authority to control all important decisions of the trust ("Trust") or of the assets of the deceased person who is a citizen or resident of the United States.*
25. *The law of the US bank secrecy act (Bank Secrecy Act) already established, domestically, a rule similar to the FATCA, the FBAR - Report of Foreign Bank and Financial Accounts (report of foreign financial and banking accounts) - report used in the prevention/fight against financial crimes that must be delivered to the IRS by persons of the U.S. that have accounts outside the U.S. whose value added in the calendar year may exceed US$ 10,000. The competence to investigate certain crimes was delegated, in 2003, by the Financial Crimes and Enforcement Network (FinCEN) to the IRS. Although similar, the fundamental difference in relation to the FBAR is that the FATCA has information from foreign financial institutions - FFI. Accessed on May 9, 2016, at https://www.irs.gov/pub/irs-utl/IRS_FBAR_Reference_Guide.pdf. Also check in Coelho, Carolina Reis Jatoba. (2015). Banking secrecy and global governance: the incorporation of the FATCA (foreign account tax compliance act) in the Brazilian legal system in the face of the international regulatory impact. Federal Revenues Magazine: Taxation and Customs Studies, 1(2), 83-122. p. 102.*
26. *Estimates point to an international tax evasion in the U.S. (international tax gap) between US $40 billion (2002) and US $70 billion (2004) per year. It is estimated that the international tax gap, mainly by individual taxpayers, could be significantly higher than the total tax gap for corporations whose estimate in 2001 was US$29.9 billion. Guttentag, Joseph & Avi-Yonah, Reuven (2005). Closing the international tax gap. In: M. B. Sawicky (Ed.). Bridging the tax gap: addressing the crisis in federal tax administration. Washington: Economic Policy Ins. p. 101-102. The international tax gap occurs, in part, because the United States does not withhold taxes on passive income (such as interest) paid to foreign entities; on the other hand, if U.S. taxpayers channeled their investments towards a foreign entity and fail to report them in their tax returns, they shall fail to pay taxes they are legally forced to pay. Gravelle, Jane G. (2015). Tax Havens: International Tax Avoidance and Evasion. Congressional Research Service. p.1.*
27. *The case of the UBS Bank, according to Faria and Rocha, reportedly revealed that many wealthy Americans may not be complying with their tax obligations" – they were hiding investments in accounts located in Switzerland, Cayman Islands, Singapore, and Hong Kong in order to avoid taxation. Faria, Wilson Rodrigues; Rocha, Alessandra M. Gonsales. (2013). The international fight against tax evasion: how FATCA can affect the Brazilian financial institutions. Banking Law Magazine, 16(59), 381-392. p.382. After a long negotiation, the UBS and the IRS signed a settlement in which UBS paid a $780 million fine to the IRS, and also presented financial data of 4.450 customers suspected of evasion.*

Italy and Germany[28], under the argument that an intergovernmental approach would facilitate compliance, would simplify the practical implementation, and would reduce the costs of FFI's. It was the beginning of an inter-governmental agreement model, subsequently divided into two models[29] - model 1 and model 2 - that would be replicated to other interested countries, as well as the idea of a European FATCA, which would end up becoming a global FATCA, also known as GATCA[30].

In accordance with the IGA model 1, signed by the countries mentioned above, the FFIs transmit the information of the US accounts to the Tax Administration of the partner jurisdiction[31] wherever it may be located and they, in turn, transmit it to the IRS automatically. The exchange of information under this model can be with or without reciprocity of treatment.

Under the IGA model 2, the partner jurisdiction undertakes to encourage and allow that the FFIs, located in their jurisdiction, report directly to the IRS the data on the US accounts, as well as the aggregate information of holders of preexisting US accounts that did not allow the sending of data[32]. Under this model, therefore, the jurisdictions do not have access to the financial data of their taxpayers living overseas[33], since there is no exchange of information between the authorities tax.

Under both models of IGA, the procedures of due diligence (due diligence) to verify whether specific accounts can be characterized as US accounts, is a responsibility of the FFIs.

The FATCA entered into force on 01.07.2014, date on which the FFI's should have already registered on the web page of the IRS/FATCA and obtained their GIIN (intermediate global identification number) number for purposes of identification in negotiations financial. The FFI's whose jurisdictions have signed the IGA model 1, shall presume compliance, i.e., in accordance with the FATCA.

The inclusion of the FATCA in the Brazilian legal system took place through the approval of the legislative Decree N°. 146, of June 25, 2015, enacted by the Decree of the Executive Branch No. 8.506, of August 24, 2015.

The concept of financial institution[34] subject to the FATCA is quite broad and includes custody institutions, deposit entities, investment companies or specific insurance companies[35].

The United States will inform Brazil only about information relating to financial accounts of Brazilian residents, while the data reported by Brazil to the United States shall include accounts of U.S. residents and citizens. This is because the United States, as well as the Philippines and

28. *Joint statement of the United States, France, Germany, Italy, Spain and the United Kingdom on the intergovernmental agreement on the fulfillment of the FATCA. U.S. Treasury Department. (2012). Joint statement from the United States, France, Germany, Italy, Spain and the United Kingdom regarding an intergovernmental approach to improving international tax compliance and implementing FATCA. Checked on April 14, 2016, at https://www.treasury.gov/resource-center/tax-policy/treaties/ Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf..*
29. *The Internal Revenue Service. (2016). FATCA Information for Governments. Checked on April. 13, 2016 in https://www.irs.gov/Businesses/Corporations/FATCA-Governments..*
30. *GATCA is the informal nomenclature of the global FATCA, also known as - Automatic Exchange of Information - AEOI (automatic exchange of information). OECD (2016). Automatic Exchange of Information. Accessed on May 10, 2016, at http://www.oecd.org/.*
31. *The partner jurisdiction is the jurisdiction that has an agreement in effect with the US for the implementation of the FATCA.*
32. *Regarding the US accounts whose holders do not allow the exchange of information, the IRS partner might make a request to the partner jurisdiction for more specific information.*
33. *By 04/2016, 112 jurisdictions had already signed the IGA: 98 had*
34. *For the purposes of the FATCA, Brazilian financial institution means (i) any financial institution whose headquarters are located in Brazil, with the exception of their subsidiaries abroad, and (ii) all subsidiaries located in Brazil from a financial institution whose headquarters is located in Brazil.*
35. *Decree no 8506/2015 - IGA, article 1, "g" - "k".*

Bulgaria, are among the few countries that exercise jurisdiction of residence over their residents[36] and also on their citizens. In other words, in these countries resident or non-residents[37], as well as foreign residents, are subject to the income tax on the basis of their world income (worldwide) (Arnold & Mcintyre, 1995, p. 19).

The information that must be reported by the Brazilian tax authorities[38] to the IRS[39] is basically the account information and account holder information, financial institution identification and gross total amount, interest, dividends, earnings, credited to account, including:

(1) name, address, US TIN number[40] for each US individual or corporation who is the account holder and, in the case of entities that are not US-based entities, after the registration of the due diligence procedures described in Annex I, is identified as one or more Controlling Persons that are Individual or Corporation of the US, name, address, US TIN number (if any) of the aforementioned entity and each US individual or corporation;
(2) the account number (or functional equivalent information, in the absence of account number);
(3) the name and identification number of the Brazilian Reporting Financial Institution;
(4) the balance or account value (including, in the case of Insurance Contract with Monetary Value or Annuity Contract, the Monetary Value or salvage value) at the end of the relevant calendar year or other period of delivery of adequate information; or, in the event that the account has been closed during the year, immediately prior to closing;
(5) in the case of any Custody Account:
(A) the gross total amount of interest, the gross total amount of dividends and the gross total amount of other income related to assets under custody in the account, in each case paid or credited to the account (or in connection with the account), during the calendar year or another period of delivery of adequate information; and
(B) the total gross income of the sale or salvage of the property paid or accredited in the account during the calendar year or another period of provision of appropriate information with respect to which the Brazilian Reporting Financial Institution has acted as custodian, broker, representative or agent of the Account Holder;
(6) In the case of any Deposit Account, the gross total amount of interest paid or credited to the account during the calendar year or another period for the provision of appropriate information; and
(7) In the case of any account not described in subparagraph 2 (a) (5) or 2 (a) (6) of this article, the gross total amount paid or credited to the account holder in relation to the account

36. *In accordance with the jurisdiction-based taxation of residence, there is a link between the country and the person who earned the income. Under this methodology, the people are taxed on the basis of their worldwide income (worldwide), i.e., domestic income and foreign income, without reference to the source of income (jurisdiction of origin). The countries that exercise the jurisdiction of residence do so only for the income of individuals and corporations that are their residents: hence the term jurisdiction of residence. Countries such as the United States, Philippines, and Bulgaria, are the exception to the jurisdiction of residence, because they cover both their residents and citizens. Arnold, Brian J. & Mcintyre, Michael J. (1995). International tax primer. Cambridge: Kluver Law International. p. 19. See also Department of the Treasure (2015). Tax Guide for U.S. Citizens and Resident Aliens Abroad. (Publication 54). Consulted on April 22, 2016, at https://www.irs.gov/pub/irs-pdf/p54.pdf. and Department of the Treasure (2015). U.S. Tax Guide for Aliens (Publication 519). Checked on Apr.22, 2016, at https://www.irs.gov/pub/irs-pdf/p519.pdf.*
37. *Said structure follows a contentious criterion of tax residence used in the United States; If an US citizen moves to Switzerland for 10 years, for example, he will still be obliged to file his income taxes in the United States, regardless of his physical residence; such a situation is very different from most of the countries of the world, where the criterion of tax residence is usually based on the physical residence after a certain period of time (typically 6 months to a year). Alvarez, Michael Zavaleta; Speer, Andrew & Godoy, Jarek Tello. (2013). Cross-border control: problems of the FATCA and proposal for Latin America. Americas Tax Law Magazine, 4(7),159- 235. p. 167.*
38. *Article 2 (a) of the IGA - Decree no 8.506/2015.*
39. *In accordance with article 3 of the IGA, the US will report all information concerning 2014 to Brazil from the first Exchange, which took place on 09/2015. Brazil, in turn, will gradually report the information concerning 2014 and 2015, and in a complete manner for 2016. The expectation of exchange of information among countries is up to nine months after the calendar year referred to in the information provided.*
40. *Number equivalent to the CPF/CNPJ.*

for the calendar year or another period for the provision of appropriate information regarding the Brazilian Reporting Financial Institution, whether a debtor or obligor, including the total amount of all salvage payments made to the Account Holder during the calendar year or another period for the provision of appropriate information.

Although the information to be reported by the US[41] to the Brazilian tax authorities may have the same nature as that which must be reported to the IRS, it just so happens that the level of detail is less than that required by US tax authorities:

(1) name, address and Brazilian CPF/CNPJ of any person who is resident in Brazil and holder of an account;
(2) the account number (or functional equivalent information, in the absence of the account number);
(3) the name and identification number of the US Reporting Financial Institution;
(4) the gross amount of the interest paid on the Deposit Account;
(5) the gross amount of US-source dividends paid or credited to the account; and
(6) the gross amount of other US sources of income paid or credited to the account, provided that it is subject to the obligation to provide information contained in Chapter 3 of the section A or Chapter 61 of section F of the US Federal Revenue Code.

With a view to identifying the US accounts that must be reported to the IRS, the Brazilian financial institutions must perform the due diligence, according to the terms of Annex I to the IGA, which establishes procedures and parameters of specific values for individual accounts (individuals), entity accounts (corporations), preexisting accounts (accounts existing as of 30.06.2014), and new accounts (accounts open after 01.07.2014).

The review procedures which must be observed are: i) the electronic investigation of data; ii) the investigation of the physical records; iii) the the investigation of the relations manager; iv) the procedures against the laundering of money, AML (Anti-Money Laundering), and those adopted by the financial institutions on getting to know your customer (KYC- Know Your Customer) or for other regulatory purposes; v) specific procedures specific for the FATCA.

The US accounts identified are transmitted by financial institutions to the Brazilian Secretariat of Federal Revenues, through the declaration of e-financiera, which they send to the IRS.

In accordance with the US Department of the Treasury, the myth that US citizens who live overseas would renounce their US citizenship under the responsibilities and burdens resulting from the FATCA was created. For the US Treasury, there is no need to talk about myths, because the fact is that the FATCA provisions do not impose new obligations on US citizens living abroad; given the fact that the obligations of withholding at the source under FATCA fall on financial institutions that make payments to the FFI's, and the obligation of due diligence and reporting data falls on the FFI's.

On the other hand, the US Treasury adds, US taxpayers, including US citizens living abroad, are required to comply with the tax laws of the United States. Therefore, the individuals that use offshore accounts to evade their tax obligations may, with justified reason, fear that the FATCA may identify their illicit activities. Meanwhile, the decision to give up their US citizenship does not

41. *Article 2 (b) of the IGA - Decree no 8.506/2015.*

exonerate these people of their preceding tax obligations in the US; this may create additional obligations in the US for certain citizens and residents who renounce their US citizenship or residence[42].

Myth or fact, the reality is that the FATCA has caused a growing increase in the number of people renouncing their US citizenship since its implementation.[43]

4. AUTOMATIC EXCHANGE OF INFORMATION BASED ON THE COMMON REPORTING STANDARD (CRS)

The intergovernmental agreements (IGA - Model 1) signed by the five main European countries (United Kingdom, France, Spain, Italy and Germany) with the US to exchange bilateral information automatically under the scope of the FATCA, as mentioned above, acted as catalysts so that the OECD and the G20[44] will implement a similar model around the world.

In 2013, during the meeting of the G20 in Moscow[45], in accordance with the aspirations of the countries of the G8[46] and the G-20, the OECD presented a model of automatic exchange of information whose regulation is the Common Reporting Standard (SRC) (Common Standard of Reporting). This model, similar to FATCA, developed by the OECD together with the G20, defines the standard of financial information to be exchanged, the rules of due diligence and presentation of reports, as well as a technical platform. (OCDE, 2013, p. 38).

In July of 2014, the OECD published the report Standard for Automatic Exchange Financial Account Information[47], which includes the Common Reporting Standard (CRS) and the Multilateral Convention Model Among Competent Authorities (Multilateral Model Competent Authority Agreement - MMCAA)[48].

The implementation of this model of exchange of information in Brazil, as well as in the main economies of the world, depends on of the following procedures: i) signing of the Multilateral Convention on Mutual Administrative Assistance Regarding Tax Matters, that allows the automatic exchange of information among the signatory jurisdictions; ii) signing of the Multilateral Competent Authority Agreement (Multilateral Competent Authority Agreement), document that incorporates the CRS.

42. *Stack, Roberto (2013). Myth vs. FATCA: the truth about treasury's effort to combat offshore tax evasion. Consultado el 22 abr. 2016, en https://www.treasury.gov/connect/blog/Pages/Myth-vs-FATCA.aspx>.*
43. *Newlove, Russel (2016). Why expat Americans are giving up their passport. Checked on Apr., 2016, at http://www.bbc.com/news/35383435; Mullen, Jethro (2016) Record number of Americans dump U.S. passports. Checked on Apr. 20, 2016, at http://money.cnn.com/2016/02/08/news/ americans-citizenship-renunciation/; Bosley, Catherine & Rubin, Richard. (2015) A record number of Americans are renouncing their citizenship. Checked on Apr. 20, 2016, at http://www.bloomberg.com/news/articles/2015-02-10/americans-overseas-top-annual-record-for-turning-over-passports.*
44. *The countries that make up the G20 are: South Africa, Germany, Saudi Arabia, Argentina, Australia, Brazil, Canada, China, South Korea, United States, France, India, Indonesia, Italy, Japan, Mexico, United Kingdom, Russia, Turkey and the European Union member countries.*
45. *OECD. (2013). Secretary-General Report to the G20 finance ministers and central bank governors. Paris: OECD. Accessed on May 25, 2016, at http://www.oecd.org/g20/topics/taxation/OECD-tax-report-G20.pdf.*
46. *The countries that make up the G8 are: United States, Japan, Germany, United Kingdom, France, Italy, Canada. (Russia, then member of the G8, was suspended after the reunification of Crimea).*
47. *<?> OECD. (2014). Standard for automatic exchange financial account information. Paris: OECD. p. 29 and 215. Accessed on May 23, 2016, at http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm.*
48. *The Model of Agreement of the Competent Authority may be multilateral (Multilateral Model Competent Authority Agreement - MMCAA), signed by the jurisdictions that are parties of the Multilateral Convention, or bilateral (Model Competent Authority Agreement - MCAA). In this study we will address only the multilateral model; model adopted by Brazil.*

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, signed by all members of the G20 on November 3, 2011 in Cannes Summit was approved by Legislative Decree n. 105 of April 15, 2016, deposited with the OECD on June 01, 2016 with effect on entry into force on October 1, 2016, promulgated by Decree 8842 of 29 August 2016 and, currently, has 103 jurisdictions[49] participants, among them several tax havens.

The Convention addresses the five main methods of administrative cooperation among Member States on tax matters and, especially, pertaining to this study, the automatic exchange of information (art. 6).

> i) **Exchange following a request**, i.e., a communication by the requested State of information relating to a particular case, requested in a manner expressed by the requesting State (article 5);
> ii**) Automatic exchange**, i.e., the systematic transmission of information on certain items of income or capital by one Party to the other Party (article 6);
> iii) **Spontaneous exchange**, that is, the communication of information obtained in the course of the review of the situation of a taxpayer, or other circumstances, which may be of interest to the recipient State (article 7);
> iv) **Simultaneous tax audit**, that is, the communication of information obtained in the course of a review carried out simultaneously on each of the interested Parties, on the basis of an agreement between two or more competent authorities, on the tax situation of one or more persons, which has for these States common or additional interest (see article 8);
> v) **Tax audit overseas**, i.e., obtaining information under the presence of representatives from the tax administration of the requesting State during a tax audit carried out in the requested State (article 9)[50]. (OECD, 2011, p. 30, the boldface is ours)

The CRS is the standard that defines due diligence procedures to be observed by financial institutions in order to identify accounts and financial information to be reported. Such procedures are crucial, because they help to ensure the quality of the reportable information.

Under this standard, the jurisdictions obtain a report from the financial institutions and automatically exchange financial information pertaining to all the accounts of the report with partners in treaties, as appropriate, identified by financial institutions on the basis of common reporting rules and the due diligence. The term "**financial information**" means interest, dividends, account balance, income from certain insurance products, the proceeds of the sale of financial assets and other income generated with respect to the assets held in the account or payments related to the account. The term "**reportable accounts**" means accounts of individuals and entities (which includes trusts and foundations), and the standard includes the requirement to verify passive entities to inform the relevant controlling persons. (OECD, 2103, p. 38, the boldface is ours).[51]

The procedures of due diligence, outlined in sections I to IX of the Common Standard on Reporting and Due Diligence for Financial Account Information are similar to the procedures of the FATCA and seek to identify them types of accounts that must be informed to the Treasury and subsequently reported. (OCDE, 2014, p. 29-61)

49. *Check at OECD (2016) Convention on mutual administrative assistance in tax matters. Consulted on Sep 05, 2016, at https://www.oecd.org/ctp/exchange-of-tax-information/convention onmutualadministrativeassistanceintaxmatters.htm.*
50. *OECD. (2011). Convention on mutual administrative assistance regarding tax matters. Accessed on May 10, 2016, at http://www.oecd.org/ctp/exchange-of-tax-information/POR-Amended-Convention.pdf.*
51. *See also: Rocha, Sergio Andre. (2015). International exchange of information for tax purposes. Sao Paulo: Quartier Latin. p. 121-123.*

The CRS was finalized and approved by the OECD and the G20 in 2014. Subsequently, the process of commitment among the members of the Global Forum[52] got underway, and it currently has 96[53] jurisdictions committed to implement it in 2017/2018, with a view to ensuring an automatic exchange of effective information among the partners. Brazil pledged to exchange information based on CRS in 2018.

The exchange of information under the FATCA and CRS is quite similar. In both models the exchange occurs automatically, the type and nature of the information to be provided and due diligence procedures are virtually the same, except for the fact that under the FATCA data to be reported refer to residents or citizens of the United States; the Treaty is bilateral in nature (IGA - model 1) and there is the possibility of withholding at the source for revenues from the US, in case of non-compliance by the financial institutions. Meanwhile, under the CRS the Treaty is Multilateral in nature, the information to be reported refers only to residents of the respective jurisdictions and the hypothesis of withholding at the source does not exist.

In the area of the European Union, the measures provided for in the CRS are contained in the Directive 2014/107/EU[54] of December 9, 2014 that modified the Directive 2011/16/EU[55] concerning the automatic exchange of mandatory information in the taxation area.

The Multilateral Competent Authority Agreement (MCAA), whose legal basis is article 6 of the Multilateral Convention, shows the CRS for national legislation and establishes the international structure that allows the international exchange of financial information. In jurisdictions where there are other instruments for the exchange of information (bilateral treaty, for example), competent authority agreement (CAA), which in this case shall be bilateral, will have the same function. (OCDE, 2014, p. 13, 215)

The MCAA provides details about the information to be exchanged among the jurisdictions, and also lists the jurisdictions in which there will be no reciprocity in the exchange of information, i.e., the jurisdictions that will report information to the signatories to the Convention of the residents of the country of destination, but who have no interest in receiving information on their residents (Annex A). (OECD, 2014, p. 13, 218).

Information to be exchanged among the jurisdictions, such as name, account information and account holder, identification of the financial institution, and the gross total amount of interests, dividends, income accredited in such accounts, in essence, is the same as FATCA member countries shall have to report to the United States, with the exception of the fact that in the context of the Multilateral Convention only information of residents shall be exchanged. Please see:

The information to be exchanged is, in relation to each account to be informed of any other jurisdiction:

52. *Global Forum on Transparency and Exchange of Information for Tax Purposes. Accessed on April 8, 2016, at http://www.oecd.org/tax/transparency/about-the-global-forum.*

53. *Check in OECD (2016). CRS by jurisdiction. Consulted on May 23, 2016, at http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/#d.en.345489.*

54. *Directive 2014/107/EU of the Council of December 9, 2014, amending Directive 2011/16/EU in regards to the automatic exchange of mandatory information in the field of taxation. Accessed on May 23, 2016, at http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32014L0107&qid=1464049971883&from=EN.*

55. *Directive 2011/16/EU of the Council of February 15, 2011 on administrative cooperation in the field of taxation and which repeals Directive 77/799/EEC. Checked on May 23, 2016, at http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32011L0016&qid=1464051590433&from=EN.*

a) name, address, TIN number (equivalent to the CPF/CNPJ), date and place of birth (for individuals) of the reportable person who is the account holder; name, address, TIN number, date and place of creation, in case that the account holder is a corporation and is calculated, using procedures of due diligence, that one or more of their controlling persons are reportable persons,
b) the account number (or its functional equivalent, in the absence of an account number);
c) the name and identification number (if any) of the reporting financial institution;
d) the account balance or amount (including, in the case of a contract of insurance with monetary value or annuity contract, the value in cash or the salvage value) at the end of the relevant calendar year or another appropriate period of reporting or, if the account has been closed during that year or period, the closing of the account;
e) in the case of custody accounts:
i) the total gross amount of the interest, dividends and other income with respect to the assets held in custody in the account, in each case, paid or accredited to the account (or related account) during the calendar year or another period to provide adequate information;
ii) the total gross income from the sale or salvage of financial assets paid or credited in the account during the calendar year or another period for the provision of adequate information with respect to which the reporting financial institution acted as a custodian, agent, trustee or other representative of the account holder;
f) in the case of a deposit account, the total gross amount of interest paid or credited to the account during the calendar year or another period to provide adequate information;
g) in the case of any account that is not described in section e) or f), the total gross amount paid or credited to the account holder in relation to the account during the calendar year or another period for the provision of appropriate information in relation to which the reporting financial institution is obliged or is indebted including the total amount of the salvage payments made to the Holder of the account during the calendar year or another period to provide adequate information. (OCDE, 2014, p. 218-219).

In Brazil, the MCAA, which has been signed by 84 jurisdictions[56], it should be signed soon by the Secretary of Federal Revenue, the competent authority appointed for such (Decree 8,842 / 2016, § 2º).

Information will be exchanged within a period of nine months after the corresponding calendar year, as in the FTCA, and shall be subject to the rules of confidentiality and guarantees provided for in the Convention; and also, if necessary, to the guarantees laid down in the respective domestic legislation that may be specified by the competent authority. The aforementioned authority shall notify the Secretariat of OECD about the breach of confidentiality, failures in safeguards, sanctions and corrective measures applied. (OECD, 2014, p. 219-220).

After the implementation of the automatic exchange on the basis of the CRS, we will have a kind of Global FATCA (GATCA)[57]. In this new model, the jurisdictions will have access to the information of the financial accounts of their residents in the partner jurisdictions without it being necessary to enter into a bilateral treaty with each State, as occurs in the FATCA, since they are signatories of the Multilateral Convention. It just so happens that the CRS standard optimized exchange of information provided for under the FATCA.

56. *OECD (2016). Signatories of the multilateral competent authority agreement on automatic exchange of financial account information and intended first information exchange date. Consulted on Sep 05, 2016, at http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/ MCAA-Signatories.pdf.*
57. *See note 31*

5. THE FEDERAL SUPREME COURT AND THE BANK SECRECY

The legality of the Complementary Law No. 105/2001 concerning access to bank data of taxpayers by the tax authorities, without the intervention of the Judicla Branch, was discussed by the Federal Supreme Court for the first time in 2010, in the motions of Injunction N°. 33/PR, linked to the Special Appeal No. 389808/PR without overall impact[58], handed down on 15.12.2010.

In the motion of Injunction 33, Justice Marco Aurelio, Rapporteur, deferred the injunction to prevent, until the final ruling on Special Motion N° 389.808 is handed down, providing banking information to the Secretariat of Federal Revenues, and the non-use of the information so obtained. The Supreme Court Plenary, however, by 6 votes to 4, denied the endorsement to the injunction granted under the AC-33.

However, upon analyzing the merits of the Special Appeal N°. 389.808, in most of the judges present, by 5 votes against 4, prevailed the view that access by the Treasury to the bank information of taxpayers without a judicial authorization is unconstitutional; and this also configures an offense against fundamental rights - privacy, privacy and confidentiality of the data - provided for in paragraphs X and XII of article 5 of the CF/88.

It turns out that upon characterizing art. 6° of Complementary Law N°. 105/01 and Decree N°. 3,724/01 as unconstitutional, through the aforementioned ruling, the Court failed to heed the requirements of art. 97 of the CF[59] and art. 173 of the Internal Regulation of the Federal Supreme Court that require an absolute majority of their members – in this case, six votes – to declare the unconstitutionality of the law or regulatory act of the Public Power. As Leal pointed out, the ruling handed down, in disagreement with the Constitution and the Internal Rules of the STF, "both public order provisions, which should have been known officially," has to do with the decision failing to state the "appropriate precedent to pacify the matter and reveal the criteria of the Federal Supreme Court on the matter." (LEAL, 2013, p.18, 14)[60].

On 24.02.2016, after 15 years of promulgation of the law, Motions of Unconstitutionality nº 2.390, 2.386, 2.397 and 2.859, as well as Special Appeal No. 60.1314 were decided, with overall impact, questioning the legality of the State Treasury's access to bank information of taxpayers, without the intervention of the Judicial Branch (LC 105/2001, articles 11º, § 3º and 4º, 3º, § 3º, 5º and 6º; Decree No. 3.724/2001; Decree N°. 4.489/2002)[61].

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58. *Overall impact: procedural instrument included in the Federal Constitution of 1988, through the Constitutional Amendment No. 45, allowing the Supreme Court selecting the extraordinary resources that examine, in accordance with the relevant legal, political, social, or economic criteria. Once verified the existence of overall impact, the Supreme Court examines the merits of the question and determined the affected resources, the colleges will declare handicapped other resources dealing with the same dispute or decide them by applying the asserted thesis. (arts.) 1035-1039 of the law nº 13.105, of 16 March 2015. (Code of Civil procedure - CPC).*
59. *CF: article 97. Only by the vote of an absolute majority of its members or of the members of the respective special body may the courts declare the unconstitutionality of a law or normative act of public power.*
60. *Failure to comply with the above requirements was embargo of the Declaration of national finance and the Attorney General of the Republic still awaiting judgment up to the present.*
61. *Not yet published statements. See Supreme Federal Court (2016, feb. 22-26). Informativo no 815. Accessed 10 may 2016, in http://www.stf.jus.br//arquivo/informativo/documento/informativo 815.htm and Supreme Court (2016, mar 04). Informativo no 816. Retrieved 10 may 2016, of http://www.stf.jus.br//arquivo/informativo/documento/informativo816.htm.*

The plenum of the STF, by majority vote - 9 to 2 - decided that access to bank information of taxpayers by the State Treasury does not represent a breach of bank secrecy, but rather the transfer of the secret from the banking sphere to the taxation domain, both protected against access by third parties. In light of the legal duty of the tax administration to preserve the secrecy of the data, one cannot talk about offense to the Federal Constitution.

The Magistrate Ruling on the Special Appeal, Justice Edson Fachin, defended the constitutionality of the provisions under the following grounds: i) the non-absolute nature of banking secrecy, which must give space to the principle of morality, in the cases in which banking transactions represent illegal acts; ii) the LC 105/2001 is in line with the commitments undertaken by Brazil under international treaties with a view to expand fiscal transparency and enable the exchange of tax information, in order to fight illicit acts such as money-laundering and tax evasion; iii) the identification of the assets, income and economic activities of the taxpayer by the tax administration gives support to the principle of contributory capacity (art. 145, §1º, CRFB/88), which, in turn, suffers risks when limiting the hypothesis that authorize their access to bank transactions of taxpayers; iv) Public Power did not move away from constitutional parameters upon creating specific requirements for the request for information by the tax authorities to financial institutions, while also maintaining the secrecy of taxpayer's financial information, transferring the duty of keeping secrecy from the banking sphere to the taxation domain; v) article 6 of LC 105/2001 is specific upon enabling the review of the documents, books and records of financial institutions only if there is an open administrative process or ongoing fiscal procedure and these reviews are considered indispensable by the competent administrative authority, and, in addition, the single paragraph of this legal provision establishes that the results of the reviews, information and documents referred to in this article are preserved in a confidential manner, in compliance with the tax legislation.

The Justice Presiding Over the Direct Unconstitutional Motion, Justice Dias Toffoli, pointed out the following underlying principles: i) the practice provided in LC 105/2001 is common in many developed countries and the declaration of unconstitutionality of the challenged provision would be a setback to the international commitments made by Brazil to combat illegal acts, such as money-laundering and tax evasion, and to curb the practices of criminal organizations; ii) the provisions challenged do not violate the fundamental right, mainly in terms of privacy, because the law does not permit the violation of bank secrecy, but the transfer of that secrecy from the banks to the State Treasury; iii) the challenge to the guarantee of banking secrecy does not occur with the simple access to the data information of taxpayers, but with the eventual disclosure of these data; v) the confluence between the fundamental duty of taxpayers of paying taxes, whose base is the social solidarity, and the duty of the tax authorities to tax and oversee correctly, which requires the adoption of effective means of combating tax offenses.

Justices Marco Aurelio and Celso de Mello's view was defeated, as they interpreted the legal provisions being challenged as understanding that there is no possibility of direct access to banking information by public entities, even going as far as to prohibit the exchange of information. This may occur in light of the hypothesis provided for in the final clause of paragraph XII of article 5 of the CF, for purposes of criminal investigation or criminal prosecution.

The position of Justice Gilmar Mendes should also be pointed out; he also went along with the majority, but cast his vote only on the RE 601.314, and the ADI 2859, since he was unable to participate in the ruling of the ADIs 2.390, 2.386 and 2.397, due to his performance as attorney general of the Union. The magistrate, who voted completely differently on the RE 389.808, in this manner resorted to arguments used by Justice Ellen Gracie (vote won in 2010 vote) when the decision on that event was handed down. According to Gilmar Mendes, the instruments provided for in the contested law lend effectiveness to the general duty to pay taxes, not being isolated measures in the context of the performance of finance authorities, who have specific prerogatives and powers to enforce this duty. She also emphasized that the inspection of baggage in airports is not disputed, although a procedure is quite invasive, but is a measure necessary and indispensable so that the customs authorities can supervise and collect taxes.

In the end, the Justice Presiding Over the Direct Motions of Unconstitutionality observed the views of other justices to explain the understanding of the Court on the application of the law in the sense that States and Municipalities can only obtain the information specified in article 6 of LC 105/2001 after the regulation of the matter, analogously to Federal Decree 3.724/2001, and shall contain the following guarantees: i) thematic relevance between obtaining the bank information and tax being collected in the established administrative procedure; ii) after notifying the taxpayer of the opening of the process and about all other acts; iii) making the request for access subject to a high-ranking official; existence of electronic security systems that are certified and with access record; iv) establishment of effective instruments of verification and correction of deviations.

6. CONCLUSIONS

In the process of incorporation of measures to combat tax fraud, tax evasion, money laundering, in which fiscal transparency and exchange of information occupy a prominent place, Brazil is moving side-by-side with the world's largest economies, taking into account its participation in both the FATCA and CRS, among others[62].

In this scenario, Brazil is "integrated into the more sophisticated actions of the new paradigm of taxation, that is, the 'Global Treasury.' Fiscal isolation of nations, entrenched in their inalienable sovereignty, came to an end. Another 'iron curtain' that the world watches collapse" (Torres, 2015, p. 2)[63].

The Global Treasury ensures the elimination of the differences in treatment between those who pay their taxes and nonfilers, aiming at the expatriation of resources or sophisticated means of organizing assets overseas. This concept is in line, therefore, with the "era of transparency and tax compliance. (Torres, 2015, p. 2).

62. *Brazil is also cooperating in the plan of action BEPS - Base Erosion and Profit Shifting (Erosion of the Base and transfer of benefits) developed by the OECD to combat erosion of the tax base and the transfer of profits to low tax jurisdictions.*

63. *Heleno Torres says that "in times past, as everyone knows, the legal systems were characterized by the territoriality of the Administrations of the States, even for the little relevance of their activity economic with international focus." Even the acceptance of foreign rulings with tax applications and the granting of exequatur requests in tax matters were admitted. Torres, Heleno Taveira (2015). Brazil innovates to comply with sophisticated practices of the Global Treasury system. Legal Consultant. Checked on Mar. 10, 2016, at http://www.conjur.com.br/2015-jul-08/consultor-tributario-brasil-inova-aderir-praticas-sistema-fisco-global.*

In this context, although the FATCA may at first appear as a typical imperialist rule, what happens is that the most important countries in the world (currently 113 jurisdictions have already joined the program), following the path of the US, have embraced the cause in the fight against countries that still insist on maintaining banking secrecy regarding treasury authorities. The rule does not purport to conduct an investigation of the accounts of taxpayers, but only verify that the amount of financial assets abroad match the amounts declared to the tax authorities. Therefore, taxpayers, whether Brazilian (resident) or US (citizen or resident), who have any financial assets abroad that is compatible with the amounts reported on their tax returns will not be affected by FATCA.

Even if the tax position taken by the US is questioned, we must conclude that such a measure prompted greater fiscal transparency worldwide. The impact was si great that the OECD, along with the world's leading economies (G20), developed a standard (CRS) whose implementation at the global level is supported by 82 jurisdictions, in which the exchange of information will occur in 2017 / 2018. It should be noted that under this model, there is no expectation of withhnolding of 30% in the event of noncompliance, involving only an exchange of information automatically. This demonstrates the increasing interest of jurisdictions in measures to combat tax fraud, tax evasion, money laundering, in which the access of tax authorities to financial information of taxpayers, internally and externally, is of fundamental importance.

In these new models of information Exchange, there is no need to talk about jurisdiction reservation, since the financial information, endorsed by the Federal Supreme Court, is protected by bank secrecy; once transmitted to tax authorities, it is protected by tax secrecy, without prejudice to the former.

We are not saying that bank secrecy should not exist; no, what should not exist is bank secrecy before the tax authorities. After all, saying that access by tax authorities to bank information, without the intervention of the Judiciary, "violates privacy is a bit contradictory when compared with the obligation to file income tax returns, declaring assets and income imposed on taxpayers, whether individuals or corporations"(Giannetti, 2009, p 7592.); hence we talk about the myth of banking secrecy before the tax authorities.

It is important to highlight that if financial transactions, whether in domestic accounts or offshore accounts, match declared income and are in keeping with the tax laws, taxpayers do not need to worry because any discrepancies found shall be fully justified since there were no movements breaching tax legislation.

If the Federal Supreme Court had ruled tax authorities' access to bank information unconstitutional without regard for jurisdiction, we would anticípate the following consequences, among others:

i) in the field of FATCA, financial institutions would have to obtain the express consent from customers[64] (US accounts) to report information to the Brazilian tax authorities in order to transmit it to the IRS. In the case of refusal by the customer, we would have the following scenarios: a) the financial institution would cancel the customer's account, contracts, etc.; which could lead to civil consequences for breach of contract; on the other hand, depending on the type of customer, it may be irrelevant for the bank lose him/her; b) the financial institution would not comply with the rules of FATCA and assume the risk of withholding of 30% of

64. *In accordance with art. 1º, §3º, V, of Complementary Law No. 105/2001, disclosing confidential information with the express consent of those concerned does not constitute a violation of the obligation to maintain secrecy.*

the amounts derived from US source, which would place it in unfavorable conditions to compete in the international market, facing restrictions or increased costs to operate with financial institutions participating in the FATCA. (Coelho, 2015, p. 87).

ii) In the area of CRS, it would show that the country moves in the opposite direction of the largest economies in the world; it would prevent Brazil from receiving information from abroad that may constitute tax crimes; it would leave the country in an extremely delicate position in the international arena, since the jurisdictions referred to in the Brazilian[65] list of countries or dependencies with favored taxation and privileged tax regimes (Cayman Islands, Bermuda, Barbados, Liechtenstein, etc.) would join the model.

Finally, it is in this global scenario that we affirm that bank secrecy before the tax authorities is a myth. If in the recent past bank secrecy was already questioned, with the implementation of new measures of transparency under this new paradigm of taxation, there is no need to speak about its existence; always remembering that such data once transferred to the tax authorities will always be protected by tax secrecy.

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65. *Check Ordinance RFB No. 1,037, of June 4, 2010.*

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